IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 5, 2006

ROBERT K. HOLLOWAY v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Dickson County
No. CR-7385 Robert E. Burch, Judge

No. M2005-02273-CCA-R3-PC - Filed May 15, 2007

The petitioner, Robert K. Holloway, appeals the denial of his petition for post-conviction relief. On appeal, the petitioner argues that his counsel rendered ineffective assistance because he: (1) failed to interview and call certain witnesses to testify; (2) failed to submit proof of the victim's propensity for violence; (3) failed to impeach certain witnesses at trial; (4) failed to divulge a conflict of interest; (5) failed to introduce a letter written by the victim at trial; and (6) failed to challenge the petitioner's sentence at the sentencing hearing and on appeal. The petitioner further argues that the cumulative effect of all of counsel's errors requires reversal. After a thorough review of the record and the parties' briefs, the judgment of the post-conviction court denying post-conviction relief is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which DAVID G. HAYES and JOHN EVERETT WILLIAMS, JJ., joined.

Patrick G. Frogge (on appeal), Michael J. Flanagan and James P. McNamara (at trial), Nashville, Tennessee, for the appellant, Robert K. Holloway.

Michael E. Moore, Acting Attorney General and Reporter; Blind Akrawi, Assistant Attorney General; Dan Mitchum Alsobrooks, District Attorney General; and Suzanne Lockert, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

The petitioner was convicted by jury of second degree murder, and he was subsequently sentenced to forty years at 100% as a Range II, multiple, violent offender. On direct appeal, this court affirmed the judgment of the trial court regarding the petitioner's conviction but vacated the court's ruling on the petitioner's premature pro se claim of ineffective assistance of counsel. *See*

State v. Robert Kern Holloway, No. M2002-01904-CCA-R3-CD, 2003 WL 22142497 (Tenn. Crim. App., at Nashville, Sept. 17, 2003), *perm app. denied* (Tenn. Dec. 22, 2003). The following is a recitation of the convicting evidence set forth in this court's opinion on direct appeal:

> On March 13, 2001, a fight broke out between two inmates in the "B-Pod" at the Dickson County Jail, in which the defendant, also known as "Chow Hound," stabbed the victim, Mark Hall, multiple times with a "shank," or homemade knife. After the victim collapsed, the defendant called prison officials over the intercom. When prison officials arrived, the victim had a faint pulse and was transported to the Horizon Medical Center emergency room where he later died as a result of multiple stab wounds.
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> At trial, several of the inmates who were present in B-Pod on the day of the altercation testified to the events leading up to the victim's death. That morning, prison officials were upset with the inmates in B-Pod because they refused to clean up. After several requests that the inmates clean their pod, prison officials turned off the power, denying the inmates television and phone access. After the power was turned off, the victim approached the defendant and asked to use the defendant's shank, apparently to get to another source of electricity to attach a wire to heat his coffee or to try and make a television set operable. The defendant refused and told the victim to "go on and leave me alone," or "I want it to be over," to which the victim replied, "[I]t's not over" or "[I]t's not over with by a long shot."
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> The victim then proceeded toward his bunk in another section of the pod and went to the door of the pod to receive his medications from the prison nurse. Shortly after the victim returned to his bunk, the defendant approached and stabbed him with a shank. The victim was unarmed.
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> Several of the inmates testified that, after the initial stabbing, they heard the victim say "put the shank down, fight like a man." The defendant did not put the shank down and proceeded to follow the victim around several areas of the pod. Each time the victim stopped, the defendant stabbed him a few more times. At some point during the altercation, the victim attempted to pick up a milk crate and swing it at the defendant. Finally, the victim collapsed near the stairs and the defendant called for prison officials.
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> Deputy Tracy Gage and Nurse Wendy Smith, who had just administered medications to the inmates in B-Pod prior to the altercation, both testified that the defendant did not inform them that he was having a problem with the victim. They also said that, while they were administering medications to the inmates in C-Pod, they heard the inmates in B-Pod kicking the door and screaming. Gage then radioed for assistance.

Captain John Patterson testified that he and Lieutenant Bruce responded to Deputy Gage's call. Upon entering B-Pod, Patterson noticed the victim, who appeared to have been stabbed, lying under the stairwell. Patterson said the victim had a "very faint pulse," and he moved the victim in order to administer CPR. He accompanied the victim to the hospital, where the victim later died. Patterson identified a videotape of the area where the attack occurred and explained in detail what was shown on the tape as it related to the incident.

Patterson also testified that it was prison policy to separate inmates who were having problems. The separation of inmates occurs immediately if an inmate notifies prison officials, orally or in writing, of a problem he is having with another inmate and separation is automatic for fighting. Patterson also stated that he had not received any complaints from the defendant regarding the victim before or on the day of the incident.

Detective B.J. Gafford of the Dickson County Sheriff's Department was called to the jail to investigate the events that transpired on March 13, 2001. Gafford testified that a search of the shower area in the B-Pod uncovered a weapon, which he described as "a piece of plastic or maybe plastic and tissue on the handle and sharpened on the end." He also observed two small holes in the shower curtain and found two other shanks in a vent above a urinal in the shower area.

Buddy Tidwell, an investigator with the district attorney general's office, was also called to the scene to investigate. Tidwell testified that while he was searching the G-Pod, the defendant told him to check the mop buckets. Tidwell discovered that two of the mop buckets had removable metal handles. A yellow mop bucket with a missing handle was found in a janitorial closet "right off the common area outside of 'B' pod." He compared the handle of one of the buckets to the shank found in the shower and explained its resemblance to the shank:

> It's unique in size. It's about, maybe, a quarter inch or 3/8th of an inch in diameter. It's got a particular sort of farrow on the end of it that's peculiar to this mop bucket handle; and it appears to have some sort of black paint or enamel and at various places portions of the paint are chipped or missing; and this description matches the description of that shank exactly.

Officer Johnny Dotson, an inmate housed in the B-Pod of the Dickson County Jail, testified that the defendant and the victim, who was "highly tempered," had been arguing and the defendant told the victim, "[Y]ou want to take something, take this." He also said that the defendant "had killing in his eyes." Dotson recounted a prior conversation that he and the defendant had, in which the defendant stated "he was fixing to take somebody out. That he didn't want to be back on the street. He

wanted to spend the rest of his life in the penitentiary . . . ." Dotson also recalled telling defense counsel, prior to trial, that the victim was the aggressor.

Daniel Stindt, an inmate at the Dickson County Jail, also testified to the events in question and said that he originally thought that the dispute was over food, but he later learned that it was over a shank. Stindt recalled the defendant telling him that he had gotten the shank off a mop bucket. Stindt heard the defendant tell the victim, "Do you want to take my shit? Do you want to steal my shit? Do you want to take this? Well, take this," after which the defendant stabbed the victim. Stindt testified that the defendant had a "look of evil" during the altercation. He also saw the defendant walking toward the shower area after the fight.

Chris Hollis, an inmate at the Dickson County Jail who was bunking with the victim on the day of the murder, testified that he heard the defendant tell the victim, "[H]ere's your shank now," prior to stabbing the victim.

Detective Andy Davis of the Dickson County Sheriff's Department testified that he was called to the crime scene to locate any blood and diagram the crime scene. His diagram, showing the location of the blood droplets in the pod, was made an exhibit to his testimony.

Dr. Charles Harlan, a forensic pathologist, testified that he performed the autopsy on the victim. He said that the victim had been stabbed at least eight times in the front and at least seven times in the back, grouping three of the back wounds together. The wounds ranged from one to five inches deep. One of the stab wounds pierced the victim's lung and another pierced his aorta causing severe internal bleeding. The immediate cause of death was loss of blood caused by multiple stab wounds. Dr. Harlan also testified that the victim's blood tested negative for the presence of drugs or alcohol.

The defendant then put on his case in chief. First, he called Earnest Pleasant, an inmate in the B-Pod of the Dickson County Jail, who testified that the victim approached the defendant several times and asked to borrow his shank. Each time the defendant refused these requests. Pleasant admitted that, on the day of the altercation, he told one of the detectives that he had not seen anything. Pleasant said that, prior [to] this altercation, he had witnessed the victim fight two other people while in jail.

Next, the defendant testified. He said that prior to the fight, the victim asked him for his shank on three separate occasions and the defendant refused. Then, the victim left the defendant's area of the pod and proceeded to his bunk. He stated that the victim was unarmed. Testifying that he was acting in self-defense, the defendant recounted the incident:

And then I looked over and I saw [the victim] standing there and whisper [sic] to [another inmate]. So at that point I thought that he was, you know, he had given me a mean look, you know; and I thought at that point he was discussing what he was going to do to me . . . .

So I just sort of lost it at that point; and ran over to him; and-because this has been an ongoing process. He'd been bothering me for quite awhile trying to pick a fight; and stabbed him a couple of times.

Well, then he runs [to another section of the pod]. Now I ran out behind him, okay, not stabbing him. I ran out behind him; and the reason I ran out behind him is because I had stabbed him, that's true; but I ran out behind him in order-because I didn't know what he was going to do. I didn't know if he was going to go seek a weapon and retaliate or what, so at that point I stopped. He stopped and I stopped.

When I stopped, I stopped probably four to five feet from him-when I stopped, he came towards me; and when he came towards me, he had that look in his eyes; and he started talking about, put the shank down, come on let's fight, put the shank down; and he comes towards me. I'm still standing there at that point. I'm not making any effort to proceed forward. He's coming towards me.

. . . .

I wasn't getting along with him to begin with, so why am I going to loan him the shank to stick me with, so then I stabbed him a couple more time [sic]. So he comes around right through here [another section of the pod]; and once again he stops and I stop. Then he came towards me and grabbed my shirt, you know; and when he grabbed my shirt, he ripped my shirt; and I stuck him a couple more times, you know.

So then he runs over here where the milk crates were that they kept ice in; and I followed, not stabbing him, you know, I followed; and then he grabs the milk crate and comes at me with the milk crate and swings the milk crate; and I blocked the milk crate with my hand, you know; and stuck him a couple more times, you know; and the whole time he's hollering, put the shank down, you know, come on lets fight, put the shank down. But I stopped and he's not making any attempt to avail himself of the situation. He's still proceeding on the attack, you know.

> So anyway, he runs over here [another section of the pod], you know, and I followed over there, you know, and I can't remember at that point if I stuck him or not to be honest with you, you know; but then he runs over here and when he runs over here, [another section of the pod], he's under the steps. Well, there's a table right there and I stop probably about right in here somewhere, if I remember correctly; and then he drops; and when he dropped, you know, I run over and hit the button to try to get him some help, you know.
>
> The defendant also testified that he brought the shank to his pod from H-Pod and made the handle out of plastic "probably three or four nights prior to [the altercation]." He said that he hid the shank behind a milk crate within his reach and retrieved it after he and the victim had their argument.

Id. at *1-4.

On August 5, 2004, the petitioner filed a pro se petition for post-conviction relief. Thereafter, post-conviction counsel was appointed, an amended petition was filed, and an evidentiary hearing was held on June 24, 2005. Relevant to the allegations presented on appeal, the evidence presented at the hearing is as follows: The petitioner testified that he received the ineffective assistance of counsel at trial and on appeal. The petitioner asserted that his counsel only visited with him three times during the course of his representation – at his arraignment, the preliminary hearing, and one week before trial. The petitioner recalled that at the preliminary hearing, he gave counsel a list of eight inmate witnesses who would testify favorably for the defense.[1] The petitioner asserted that these witnesses "were aware of [the victim's] overall attitude in the pod." The petitioner also asserted that he talked to counsel on the phone and counsel promised to visit him but did not keep this promise. The petitioner said that when he attempted to discuss trial strategy, his counsel "stonewalled . . . saying, I'm going to see you; yeah, I'm going to get your witnesses; we're going to present the video tape; we're going to be ready . . . ." The petitioner noted that he was transferred from the Dickson County Jail to the River Bend Maximum Security Institution. The petitioner asserted that counsel never came to River Bend to talk to him about these things.

The petitioner testified the he believed the videotape of his interview with law enforcement officers was going to be introduced at trial, nonetheless, a week before trial, counsel told him that an agreement had been made to suppress the video tape.[2] The petitioner asserted that his counsel had conspired with the assistant district attorney to keep the jury from viewing the tape. However, the petitioner acknowledged that he had not viewed the tape. The petitioner also asserted that he

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[1] The petitioner stated the witnesses were: Jerry Simmons, Larry Simmons, Ernie Pleasant, John Walker, Jeff Kemper, Jessie Hatfield, Kenneth Weatherspoon, and Michael Graham.

[2] The petitioner claimed in his petitions that the videotape would have been favorable to his claim of self-defense in that the tape would have showed his emotional condition at the time he learned the victim died and would have showed he was remorseful.

requested counsel look into additional mitigating evidence such as his good work history, education, health problems, and former drug habit. The petitioner said that an investigation of his medical records would have revealed that he had tuberculosis and would not have been able to fight as well as the state suggested.

The petitioner testified that he received a letter from counsel indicating that the state had offered to let him plead guilty to second degree murder and receive a fifteen to twenty year sentence with parole eligibility at thirty percent. The petitioner asserted that counsel failed to inform him of his parole ineligibility if convicted of second degree murder. The petitioner further asserted that counsel did not discover this information until the sentencing hearing. The petitioner stated that he probably would have accepted the plea offer had he been correctly informed.

The petitioner testified that counsel failed to investigate and challenge the testimony of the medical examiner and the autopsy report. According to the petitioner, he told counsel that the weapon used to stab the victim in the front was long enough to create exit wounds to the victim's back. Therefore, the autopsy report incorrectly indicated that the victim suffered stab wounds to his back. The autopsy report also erroneously indicated that the victim was not under the influence of alcohol or drugs at the time of death. The petitioner asserted that a challenge to the autopsy report was vital to his theory of self-defense, but counsel did not challenge the autopsy report or the testimony of the medical examiner during cross-examination.

The petitioner claimed that counsel did not give him all discovery materials until after the trial. It was only then did the petitioner discover a letter written by the victim on the day he was killed.[3] The petitioner asserted that the letter indicated that the victim was on prescription drugs, was violent, and disliked the petitioner. The petitioner acknowledged that his name was not mentioned in the letter, but claimed he was referred to as "Bitch Boy Punk" in the letter. However, the petitioner admitted that he was never called this name in jail. The petitioner also asserted that counsel had an attorney-client relationship with one of the state witnesses, Mr. Stindt.[4]

The petitioner asserted that counsel conspired with the assistant district attorney regarding a late filing of notice of enhancement factors. The petitioner said that the pre-sentence report indicated that as of April 25, 2002, no notice of enhancement factors had been filed by the state; therefore, the notice was not timely filed. The petitioner also asserted that counsel did not help him fill out the pre-sentence report. The petitioner further asserted that counsel did not meet him before the sentencing hearing and was unprepared for the hearing. According to the petitioner, counsel did not effectively present mitigation evidence at the hearing and failed to object to the enhancement factors offered by the state. Neither did counsel inform him that he could testify at the hearing. The

[3] We note that the letter is handwritten and mostly illegible.

[4] Portions of the record indicate the spelling of this name as "Sinbt." However, we have chosen to use the spelling "Stindt" found in the facts section of the petitioner's direct appeal.

petitioner also stated that counsel failed to challenge his sentence of forty years on direct appeal notwithstanding the fact that his sentence was presented as an issue in the motion for a new trial.

The petitioner asserted that his sentencing was tainted with prosecutorial misconduct. The petitioner explained that prior to his trial he had been charged with two counts of attempted escape and vandalism, which were dismissed. However, these charges were re-instated by the state prosecutor prior to sentencing to enhance the petitioner's sentence. After he was sentenced for second degree murder the charges were once again dismissed.

On cross-examination, the petitioner asserted that the assistant district attorney and his trial counsel had conspired against him because he had "committed a killing in jail." The petitioner acknowledged that the witnesses at trial including the state witnesses testified that the victim started the argument with the petitioner. However, the petitioner denied that these witnesses testified that he assaulted the victim after the victim stopped bothering him. According to the petitioner, ten minutes after he was found guilty, a probation officer handed him the pre-sentence report and requested it be filled out. However, the petitioner was too upset to complete it and believed counsel was responsible for the report.

The petitioner's counsel for trial and appeal testified that he was appointed to represent the petitioner at the time of the petitioner's first appearance. Counsel recalled that he discussed the case with the petitioner while the case was still in General Sessions. Counsel stated that he probably met with the petitioner several times because he was over at the jail a lot. Counsel could not recall if he met with the petitioner after the petitioner was transferred to River Bend. However, counsel said that he talked to the petitioner over the phone many times. Counsel recalled that he discussed with the petitioner the list of potential witnesses but did not remember when. Counsel also recalled that he visited the pod where the stabbing took place and interviewed the jail personnel present the day of the altercation. Counsel also mentioned that he received a videotape and pictures of the pod taken the day of the altercation.

Counsel testified that he reviewed the witness statements and spoke to several inmate witnesses who were in the pod when the fight started. Counsel recalled that there were at least seventeen inmates in the pod when the altercation took place but only two or three inmates witnessed it. Counsel said that he did not investigate whether any of the inmate witnesses received preferential treatment from the state for their testimony. However, counsel asserted that the state would have informed him if preferential treatment was given to the inmate witnesses in exchange for their testimony. Counsel stated that he did not plan on impeaching the inmates, who were state witnesses, because they were going to testify favorably to the petitioner's theory of self-defense. Counsel recalled that most of the state witnesses testified at trial that the victim initiated the fight, which in his opinion, was consistent with the petitioner's theory of self-defense.

Counsel acknowledged that he did not secure the petitioner's medical records in order to bolster the petitioner's claim that he had back problems and "was an unfit person to be in a fist fight." Counsel recalled vaguely that he and the petitioner discussed the medical examiner's autopsy

report. Counsel noted that the petitioner contested the autopsy report indicating the victim was stabbed in the back as well as the front. However, counsel could not recall the details of the report. Counsel stated that he was aware that the medical examiner had been dismissed from the position in Davidson County but did not investigate. Counsel said that he did not investigate or attempt to impeach the credibility of the medical examiner because he believed that "credibility wasn't an issue in this self-defense case." According to counsel, "[t]he victim died of stab wounds [and the petitioner] admitt[ed] stabbing him in self-defense." The medical examiner's testimony was that the victim was stabbed multiple times in the front and back and died as a result. The defense theory was that the petitioner had to defend himself up until the victim died because the victim was not going to stop fighting and there was no place to retreat in the pod. At trial, some of the witness testimony was consistent with the defense theory, however, some of the witness testimony indicated that the petitioner was chasing the victim and stabbing him.

Counsel testified that he did not believe he had a conflict of interest with Mr. Stindt, a state witness. Counsel recalled that Mr. Stindt was a pro se co-defendant of an individual he represented in the past. Counsel recalled that he rendered some "armchair" assistance to Mr. Stindt during the case. Counsel stated that he did not know Mr. Stindt was a state witness in the petitioner's case until the day of trial. Counsel asserted that he reviewed Mr. Stindt's statement, which indicated he would testify that the victim was the initial aggressor.

Counsel recalled that the state had an open file policy for discovery. Counsel said that he reviewed the videotape of the petitioner's statement to law enforcement officers and discussed the tape with the petitioner. Counsel recalled that the petitioner wanted to use the tape at trial despite the fact the petitioner "was terrible on the tape." Counsel noted that the petitioner admitted he stabbed the victim on the tape. Counsel stated that the assistant district attorney agreed with him not to introduce the videotape at trial because the petitioner's *Miranda* rights had been violated.

Counsel said that after the trial the petitioner did not want to have anything to do with him. Counsel could not recall meeting with the petitioner from the "date of the verdict to the date of his actual sentencing hearing." Counsel acknowledged that he did not file a notice of mitigation. Counsel could not recall the events that took place at the sentencing hearing. Counsel identified a letter he sent to the petitioner in November of 2001, which indicated the state had offered to let the petitioner plead guilty to second degree murder as a Range I, standard offender, "which would put [him] in the fifteen to twenty-five year range." Counsel could not recall discussing parole eligibility with the petitioner. However, counsel asserted that the petitioner was not interested in settling the case. Counsel noted that the state's notice of range and enhancement was filed well before trial on October 10, 2001. Counsel acknowledged that the petitioner received a forty year sentence as a Range II, multiple offender after being found guilty by a jury.

Danny Felts testified that he was the Sergeant of Corrections at the jail at the time the altercation took place. Felts recalled that in 1999, he and other correctional officers broke up a fight the victim had participated in. Felts noted that it was the jail policy to separate inmates who did not get along with each other. Felts noted that a report was initiated every time a inmate complaint was

made to authorities. Felts stated that neither the petitioner nor the victim complained to authorities that they were having problems.

Following the evidentiary hearing, the post-conviction court entered a detailed order denying post-conviction relief.

ANALYSIS

In his appeal, the petitioner alleges that he received the ineffective assistance of counsel at trial and on direct appeal. In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, this court is required to affirm the post-conviction court's findings unless the petitioner proves that the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court's factual findings, such as findings concerning the credibility of witnesses and the weight and value given their testimony, is de novo with a presumption that the findings are correct. *See id.* Our review of the post-conviction court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001).

In order to establish the ineffective assistance of counsel, the petitioner bears the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense rendering the outcome unreliable or fundamentally unfair. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Arnold v. State*, 143 S.W.3d 784, 787 (Tenn. 2004). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness under prevailing professional standards. *Strickland*, 466 U.S. at 688; *see also Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (establishing that representation should be within the range of competence demanded of attorneys in criminal cases). A fair assessment of counsel's performance, "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *see also Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). The fact that a particular strategy or tactical decision failed does not by itself establish ineffective assistance of counsel. *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996). Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Both deficient performance and prejudice must be established to prove ineffective assistance of counsel. *Id*. at 697. If either element of ineffective assistance of counsel has not been established, a court need not address the other element. *Id.*

I.

The petitioner first alleges that counsel was ineffective because he failed to interview and subpoena certain inmate witnesses to testify because these witnesses "would have provided exculpatory testimony at trial." The petitioner relies on an unpublished opinion, *Tavarus U.*

Williams v. State, No. 02C01-9711-CR00423, 1998 WL 742348 (Tenn. Crim. App., at Jackson, Oct. 23, 1998), to argue that this court should determine his counsel ineffective despite his failure to present these inmate witnesses at the evidentiary hearing.

In its order, the post-conviction court found that the petitioner failed to introduce the testimony of any of the inmate witnesses at the post-conviction hearing. The post-conviction court further noted that the exhibits introduced by the petitioner were cumulative of the evidence submitted at trial. The court stated:

> Evidence of the [victim's] violent nature was already introduced at trial. Any other evidence would have been cumulative. In addition, the testimony of the petitioner at his trial was to the effect that [he] attacked the unarmed [victim] with a "shank" while the [victim] was standing in his cell talking to another inmate. This fact situation does not constitute self-defense . . . . There was no testimony from any other witness that [the petitioner] acted in self-defense.

"When a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing." *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). Neither the post-conviction court nor this court may speculate on what a witness' testimony might have been. *Id*.

We begin our review by noting that *Tavarus U. Williams v. State* is clearly distinguishable from the instant case. In *Williams*, the fifteen-year-old petitioner presented clear and convincing evidence that his counsel was deficient in preparing for his trial. *Williams*, 1998 WL 742348, at *1-5. The petitioner further demonstrated prejudice via the testimony of the defense investigator that an eyewitness not related to the petitioner "felt very strongly that the victim had been pulling a gun on the [petitioner] when the [petitioner] shot him." *Id.* at *3 (internal quotations omitted). This eyewitness was available and willing to testify on the day of trial, but the witness was not called to testify due to counsel's lack of preparation. *Id*. The name of this eyewitness was never recorded neither could the defense investigator recall it at the post-conviction hearing. *Id.* at *7. Also introduced at the post-conviction hearing but not at trial was the petitioner's statement to police indicating he shot the victim in self-defense. *Id*. at *6. Upon review, a panel of this court found the following:

> The evidence to support the [petitioner's] conviction of first degree murder was not overwhelming. . . .
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> . . . .
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> Had this witness been called at trial, his testimony would have significantly bolstered the [petitioner's] theory of self-defense. And even if the testimony was not successful in convincing the jury to acquit the [petitioner], it may well have convinced them to convict him of something less than premeditated murder. . . .

. . . .

> We recognize that this witness' proposed testimony should have been produced at the post-conviction hearing under the general rule announced in *Black v. State*, 794 S.W.2d 752, 757-58 (Tenn. Crim. App. 1990). However, we think it is fundamentally unfair to hold this failure of proof against the [petitioner] and, therefore, find the *Black* rule inapplicable under the facts of this case. . . .
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> The best evidence that the [petitioner] had of the crucial testimony was [the defense investigator], and he did produce that proof at the hearing. Accordingly, *because* [the petitioner] *produced independent proof of vital testimony that would have been available at the hearing but for his trial lawyer's ineffectiveness* (in never discovering the witness, not calling him and losing all record of him), we hold that the [petitioner] has established both prongs of the *Strickland* test.

Id. at *6-7 (internal quotations and footnotes omitted, emphasis added).

Conversely, in this case, no independent evidence was presented by the petitioner establishing that: (1) the inmate witnesses were readily available and willing to give testimony vital to the petitioner's defense at trial, and (2) that the petitioner was unable to discover and present the witnesses due to the ineffectiveness of trial counsel. In fact, other than the petitioner's vague allegation that these witnesses "were aware of [the victim's] overall attitude in the pod," the petitioner does not explain how these witnesses would have been exculpatory or even favorable to his defense. Also, the record shows that the petitioner knew the identity of the witnesses he alleged to be exculpatory, yet he produced no evidence of any efforts he made to contact these witnesses. Furthermore, the record reflects via inmate testimony and the petitioner's own admissions at trial that the victim started an argument with the petitioner but walked away. The petitioner then chased after the unarmed victim and stabbed him repeatedly with a shank as he retreated. As such, it is difficult to see how additional witness testimony about the victim's attitude in the pod would have changed the outcome of the trial. Clearly, the petitioner has failed to meet the burden of proof required of him. The evidence does not preponderate against the determination of the post-conviction court, and the issue is without merit.

II.

The petitioner next alleges that counsel was ineffective because he failed to submit sufficient proof of the victim's violent nature. In support of this allegation, the petitioner submitted proof at the evidentiary hearing that the victim had been involved in separate fights with two other inmates.

Upon review, we conclude the petitioner failed to prove this allegation by clear and convincing evidence. The record reflects that the petitioner testified that the victim had a violent history and was the initial aggressor. In fact, the petitioner mentions the victim's violent history at

least four times during his own testimony at trial. Additionally, several inmate witnesses testified that the victim had a temper and acted as the initial aggressor by making threats. As a result, sufficient evidence of the victim's violent history was introduced at trial and further proof would have been largely cumulative of the evidence already introduced. More importantly, as previously mentioned, the evidence at trial, including the petitioner's own testimony, established that after the unarmed victim retreated, the petitioner pursued him and stabbed him repeatedly. According to the petitioner's own testimony –

> So I just sort of lost it at that point; and ran over to him; and - - because this has been an ongoing process. He'd been bothering me for quite awhile trying to pick a fight; and stabbed him a couple of times.
>
> I wasn't getting along with him to begin with, . . . so then I stabbed him a couple more time. So he comes around right through here; and once again he stops and I stop. Then he came towards me and grabbed my shirt, you know; . . . and I stuck him a couple more times, you know.
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> So then he runs over here . . .; and I followed, . . . and stuck him a couple more times . . . .

Even assuming that counsel erred in not introducing more proof of the victim's violent history, we fail to see how the error would have changed the outcome of the trial. Accordingly, the petitioner has failed to meet his burden, and the issue is without merit.

III.

The petitioner next alleges that counsel was ineffective in failing to impeach the credibility of witnesses at trial. Specifically, the petitioner argues that counsel should have discredited the medical examiner's findings concerning the location of some of the victim's stab wounds and the victim's drug-free status by impeaching the medical examiner with the fact that he had been dismissed from his former position as Davidson County's Medical Examiner. The petitioner also argues that counsel should have impeached the inmate witnesses regarding possible preferential treatment for their testimony and their past criminal records. The petitioner asserts that counsel's failure to discredit these witnesses undermined his theory of self-defense.

The post-conviction court found that the petitioner had failed to offer proof that he was prejudiced by counsel's alleged failure to impeach witnesses. We agree. Other than his self-serving testimony, the petitioner did not offer clear and convincing proof that the medical examiner's autopsy was false or that the inmate witnesses received any preferential treatment for their testimony. Counsel testified that he chose not to impeach these witnesses because such impeachment would not have helped the defense. Regarding the medical examiner, counsel stated that the examiner's termination bore no relevance to the issue of whether the petitioner acted in self-defense. According to counsel, the medical examiner testified that the victim died of stab wounds and the petitioner

admitted that he stabbed the victim. Thus, any impeachment of the medical examiner would not have aided the petitioner's theory of self-defense. Regarding the inmate witnesses, counsel testified that he had heard of no deals given to the inmates in exchange for their testimony. Counsel also stated that he did not impeach the inmate witnesses because they testified that the victim started the altercation which was consistent with the petitioner's claim of self-defense. Upon review, we recognize that counsel's decision not to impeach the medical examiner and inmate witnesses was a tactical one based on the information counsel had at the time, and as such, we will not second-guess it. *See Henley v. State*, 960 S.W.2d 572, 579 (Tenn. 1997). Furthermore, we fail to see how the impeachment of these witnesses would have changed the outcome of trial. The issue is without merit.

IV.

The petitioner next alleges that counsel was ineffective in failing to divulge a conflict of interest. Specifically, the petitioner argues that counsel failed to disclose that he had previously represented Mr. Stindt, one of the inmate witness who testified for the state.

Initially we note that "an accused is entitled to zealous representation by an attorney unfettered by a conflicting interest." *State v. Thompson*, 768 S.W.2d 239, 245 (Tenn. 1989). An actual conflict of interest may exist where an attorney is "placed in a position of divided loyalties." *State v. Tate*, 925 S.W.2d 548, 553 (Tenn. Crim. App. 1995); *see also State v. Culbreath*, 30 S.W.3d 309, 315 (Tenn. 2000). "If an attorney actively represents conflicting interests, no analysis of prejudice is necessary; it is presumed that his divided interests adversely affected his representation." *Thompson*, 768 S.W.2d at 245. However, prejudice is presumed only if it is demonstrated that counsel *actively* represented conflicting interests and that the actual conflict of interest affected the adequacy of counsel's performance. *See State v. Billy Jackson Coffelt*, No. M2005-01723-CCA-DAC-CD, 2006 WL 2310597, *17 (Tenn. Crim. App., at Nashville, Aug. 8, 2006); *see also Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). To establish a claim based upon a conflict of interest, the conflict must be actual and significant, not irrelevant or "merely hypothetical." *Terrance B. Smith v. State*, No. W2004-02366-CCA-R3-PC, 2005 WL 2493475, *5. (Tenn. Crim. App., at Jackson, Mar. 27, 2006).

At the hearing, counsel testified that Mr. Stindt was not a client; rather, Mr. Stindt was the co-defendant of his client. Counsel explained that Mr. Stindt was proceeding pro se at trial so he rendered some "arm chair" assistance to Mr. Stindt in the case. Counsel stated that he did not realize that he knew Mr. Stindt until the day of the petitioner's trial. After the hearing, the post-conviction court found that there was "no way that Petitioner could have been prejudiced . . . . [Counsel] did not have an attorney-client relationship with Stindt and, even if he did, the only person who might have been prejudiced thereby was Stindt."

Upon review, we first note that the petitioner failed to establish the existence of an actual and significant conflict of interest. In addition, the petitioner has not demonstrated that counsel's advice to Mr. Stindt compromised counsel's subsequent representation of the petitioner. Simply put, the

record does not demonstrate the existence of a conflict of interest. Accordingly, the record does not preponderate against the findings of the post-conviction court, and the issue is entirely without merit.

V.

The petitioner next argues that counsel was ineffective for failing to utilize certain exculpatory evidence at trial. Specifically, the petitioner contends that counsel should have introduced a letter which was written by the victim on the day he died. The petitioner alleges that the letter suggests the victim was taking prescription medication and disliked the petitioner.

Upon review, we conclude that the petitioner has not proven prejudice. First, the letter does not in any way establish the petitioner's innocence of the murder. Therefore, we fail to see how the evidence the petitioner claims as exculpatory is in fact exculpatory. Second, the record reflects that the jury heard testimony regarding the victim's possible drug use and the threats made against the petitioner by the victim. However, the record also reflects that the jury heard testimony that the petitioner approached the victim, who was unarmed, and proceeded to stab the victim multiple times with a shank. As such, we fail to see how the introduction of the victim's handwritten, mostly illegible, letter would have aided the defense or changed the outcome of the trial. Accordingly, the issue is without merit.

VI.

The petitioner next argues that counsel was ineffective in failing to challenge his forty-year sentence. Specifically, the petitioner complains that his counsel was ineffective in "failing to object to sentencing enhancement factors, failing to object to untimely notice of enhancement factors based solely on NCIC reports, and failing to offer mitigating factors." He also claims that his counsel was ineffective in failing to submit a copy of his sentencing hearing transcript on appeal, and post-conviction counsel was ineffective in the same regard. The petitioner further complains that his sentence is invalid based on the principles announced in *Blakely v. Washington*, 542 U.S. 296 (2004).

We begin by noting that the petitioner failed to include the transcript of the sentencing hearing in the record on appeal. Generally, the petitioner carries the burden of ensuring that the record on appeal conveys a fair, accurate, and complete account of what has transpired with respect to those issues that are the basis of appeal. However, the available record reflects that the transcript of the sentencing hearing was not included in the record due to a host of errors, none of which should be attributed to the petitioner. The record also reflects that the petitioner, employing a number of methods, attempted many times to get the transcript incorporated in the record. Accordingly, the

record on appeal has been supplemented with the transcript of the sentencing hearing, and we will review the merits of the petitioner's sentencing issues.[5]

We next examine the petitioner's claim that due to his counsel's ineffectiveness his excessive sentence went unchallenged at the sentencing hearing and on direct appeal. To reiterate, the petitioner must prove ineffective assistance with clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). From our review, the record supports the following facts: First, the state provided notice of enhancement factors.[6] Second, the petitioner refused to make a statement to the official responsible for compiling the pre-sentence report. Third, the petitioner had opportunity to present mitigating evidence when he testified at the sentencing hearing. Fourth, the petitioner offered some mitigating evidence at the sentencing hearing when he testified that he did not have a violent criminal history and acted in self-defense. Fifth, the petitioner qualified as Range II, multiple offender under Tennessee Code Annotated section 40-35-106 and was therefore subject to the statutory range of twenty-five to forty years.[7] Sixth, at minimum, the trial court correctly found that

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[5] First, the record clearly indicates that the transcript of the sentencing hearing was entered as exhibit one at the petitioner's post-conviction hearing. As such, the transcript should have been included in the record. However, later, in its order denying post-conviction relief, the post-conviction court noted that the petitioner's post-conviction counsel promised to supply the transcript of the sentencing hearing and failed to do so. The post-conviction court then treated all issues pertaining to the petitioner's sentence as waived. Second, the record reflects that shortly before the post-conviction hearing, the petitioner attempted to obtain the sentencing hearing transcript by filing a pro se motion. However, the post-conviction court denied the petitioner's pro se motion due to the fact that the petitioner had been appointed post-conviction counsel. The record also indicates that after post-conviction relief was denied, the petitioner attempted to obtain the sentencing hearing transcript through various pro se motions to the court. Third, the record clearly reflects that after the post-conviction hearing, the petitioner's first post-conviction counsel was allowed to withdraw and new counsel was appointed. During this time, the petitioner wrote a letter, asking his second post-conviction counsel to supplement the record with the sentencing hearing transcript. Thereafter, the petitioner's second post-conviction counsel was allowed to withdraw and new counsel was appointed. In brief, the petitioner's third post-conviction counsel notes in a footnote that the sentencing hearing transcript should be considered part of the record because it was accepted by the court as an exhibit at the post-conviction hearing. The petitioner's third counsel further notes that he was unable to supplement the record with the transcript of the sentencing hearing. Accordingly, we decline to attribute fault to the petitioner and waive the issue.

[6] The record indicates that the state sought the following enhancement factors: the defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range; the defendant had no hesitation about committing a crime when the risk to human life was high; the felony was committed on escape status or while incarcerated for a felony conviction; the defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community. *See* Tenn. Code Ann. § 40-35-114 (2003).

[7] The presentence report reflects one burglary conviction in 1980, *see* Tenn. Code Ann. §39-901 (1975), and two burglary convictions in 1986, *see* Tenn. Code Ann. § 39-3-401 (1982). Pursuant to Tennessee Code Annotated section 40-35-118, these pre-1989 burglary convictions are classified as "C felonies." Moreover, albeit incomplete, the NCIC report incorporated into the record reveals that the petitioner had a number of prior felony convictions in Virginia

(continued...)

the defendant had a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range. The court also considered the petitioner's testimony that he had a non-violent criminal history but assigned it little weight. Additionally, although not specifically mentioned by the trial court, the record clearly supports the state's proffered enhancement factor: the felony was committed while incarcerated for a different felony conviction. As such, the record supports the application of at least two enhancement factors, which affords to the judge discretion to choose an appropriate sentence within the statutory range. State v. Souder, 105 S.W.3d 602, 606 (Tenn. Crim. App. 2002). Accordingly, even assuming counsel was deficient in his performance at the sentencing hearing and on appeal, we fail to discern how the petitioner was prejudiced by counsel's performance. Specifically, the petitioner has not proven that there is a reasonable probability his sentence would have been different but for counsel's unprofessional errors. *See Strickland*, 466 U.S. at 694. With regard to the alleged *Blakely* violation, the Tennessee Supreme Court has held that *Blakely* issues are not subject to retroactive application for cases on collateral review. *Gomez*, 163 S.W.3d at 651 n.16. The petitioner is not entitled to relief.

VII.

The petitioner lastly argues that he received the ineffective assistance of counsel based on cumulative error. In light of our previous determinations, this issue is without merit.

CONCLUSION

For the foregoing reasons, we conclude that the Petitioner's allegations of ineffective assistance of counsel are without merit. Accordingly, the judgment of the post-conviction court is affirmed.

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J.C. McLIN, JUDGE

[7](...continued)
and Texas. Accordingly, the petitioner meets the qualifications of a Range II, multiple offender, having been convicted of a Class A felony and, at minimum, 2 prior C felonies. *See* Tenn. Code Ann. § 40-35-106.